

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER,
PAUL T KATAMI and JEFFREY J
ZARRILLO,

No C 09-2292 VRW
ORDER

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNORLD SCHWARZENEGGER, in his
official capacity as governor of
California; EDMUND G BROWN JR, in
his official capacity as attorney
general of California; MARK B
HORTON, in his official capacity
as director of the California
Department of Public Health and
state registrar of vital
statistics; LINETTE SCOTT, in her
official capacity as deputy
director of health information &
strategic planning for the
California Department of Public
Health; PATRICK O'CONNELL, in his
official capacity as clerk-
recorder of the County of
Alameda; and DEAN C LOGAN, in his
official capacity as registrar-
recorder/county clerk for the
County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J
KNIGHT, MARTIN F GUTIERREZ,
HAKSHING WILLIAM TAM and MARK A
JANSSON, as official proponents
of Proposition 8,

Defendant-Intervenors.

1 The defendant-intervenors, who are the official
2 proponents of Proposition 8 ("proponents") move for a protective
3 order against the requests contained in one of plaintiffs' first
4 set of document requests. Doc #187. Proponents object to
5 plaintiffs' request no 8, which seeks "[a]ll versions of any
6 documents that constitute communications relating to Proposition 8,
7 between you and any third party, including, without limitation,
8 members of the public or the media." Doc #187 at 8. Proponents
9 also object to all other "similarly sweeping" requests. Id at 8 n
10 1. Proponents argue the discovery sought: (1) is privileged under
11 the First Amendment; (2) is not relevant; and (3) places an undue
12 burden on proponents. Doc #187 at 9. Plaintiffs counter that the
13 discovery sought is relevant and not privileged. Doc #191.

14 During the course of briefing the dispute for the court,
15 the parties appear to have resolved at least one issue, as
16 proponents now agree to produce communications targeted to discrete
17 voter groups. Doc #197 at 6. The agreement appears only partially
18 to resolve the parties' differences. Because of the broad reach of
19 request no 8 and the generality of proponents' objections, the
20 unresolved issues will almost certainly arise in other discovery,
21 as well as to require resolution of the parties' differences with
22 respect to request no 8. Accordingly, the court held a lengthy
23 hearing on September 25, 2009 and seeks by this order not only to
24 address the parties' remaining dispute with respect to request no 8
25 but also provide guidance that will enable them to complete
26 discovery and pretrial preparation expeditiously.

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As an initial matter, and because plaintiffs' request no 8 is quite broad, the court must determine what discovery remains disputed. Proponents object to disclosing documents that fall into five categories: "(i) communications between and among [d]efendant-[i]ntervenors, campaign donors, volunteers, and agents; (ii) draft versions of communications never actually distributed to the electorate at large; (iii) the identity of affiliated persons and organizations not already publicly disclosed; (iv) post-election information; and (v) the subjective and/or private motivations of a voter or campaign participant." Doc #187 at 9. But in their reply memorandum, proponents explain that they only object to "nonpublic and/or anonymous communications" (emphasis in original), "drafts of documents that were never intended to, and never did, see public light" and "documents created after the Prop 8 election." Doc #197. Plaintiffs have stated they "do not seek ProtectMarriage.com's membership list or a list of donors to the 'Yes on 8' cause." Doc #191 at 13.

Plaintiffs have told proponents that they are seeking communications between proponents and "their agents, contractors, attorneys, donors or others" to the extent the communications are responsive and not otherwise privileged. Doc #187-6 at 2. Plaintiffs argue that the election materials put before the voters are insufficient to discern the intent or purpose of Prop 8. The questions whether Prop 8 was passed with discriminatory intent and whether any claimed state interest in fact supports Prop 8 underlie plaintiffs' Equal Protection challenge, at least in part. See, e g, Doc #157 at 12. Proponents assert that Prop 8 was intended

1 simply to preserve the traditional characteristic of marriage as an
2 opposite-sex union. See, e g, Doc #159 at 5. As a result of these
3 conflicting positions, the intent or purpose of Prop 8 is central
4 to this litigation. The issue on which resolution of the present
5 discovery dispute turns is whether that intent should be divined
6 solely from proponents' public or widely circulated communications
7 or disseminations or whether their communications with third
8 parties not intended for widespread dissemination may also
9 illuminate that intent. Before deciding that issue, the court
10 first addresses the grounds on which proponents seek a protective
11 order.

12 II

13
14 Proponents seek to invoke the First Amendment qualified
15 privilege to refrain from responding to any discovery that would
16 reveal political communications as well as identities of
17 individuals affiliated with the Prop 8 campaign whose names have
18 not already been disclosed. Doc #197 at 14. The free
19 associational prong of the First Amendment has been held to provide
20 a qualified privilege against disclosure of all rank-and-file
21 members of an organization upon a showing that compelled disclosure
22 likely will adversely affect the ability of the organization to
23 foster its beliefs. National Ass'n for A of C P v Alabama, 357 US
24 449, 460-63 (1958) ("NAACP"); see also Adolph Coors Co v Wallace,
25 570 F Supp 202, 205 (ND Cal 1983). This qualified privilege has
26 been found especially important if the disclosures would subject
27 members to reprisals for the exercise of their associational rights
28 under the First Amendment or otherwise deter exercise of those

1 rights. Here, however, plaintiffs are not seeking disclosure of
2 membership lists. Doc #191 at 13. Indeed, many names associated
3 with ProtectMarriage.com and the Yes on 8 campaign have already
4 been disclosed. See ProtectMarriage.com v Bowen, 09-0058-MCE Doc
5 #88 (ED Cal Jan 30, 2009).

6 The California Political Reform Act of 1974 requires
7 disclosure of a great deal of information surrounding the Prop 8
8 campaign, including the identity of, and specific information
9 about, financial supporters. Cal Govt Code § 81000 et seq.
10 Proponents have not shown that responding to plaintiffs' discovery
11 would intrude further on proponents' First Amendment associational
12 rights beyond the intrusion by the numerous disclosures required
13 under California law – disclosures that have already been widely
14 disseminated. Proponents asserted at the September 25 hearing that
15 these California state law disclosure requirements extend to the
16 outer boundaries of what can be required of political actors to
17 reveal their activities. But the information plaintiffs seek
18 differs from that which is regulated by these state disclosure
19 requirements.

20 The First Amendment qualified privilege proponents seek
21 to invoke, unlike the attorney-client privilege, for example, is
22 not an absolute bar against disclosure. Rather, the First
23 Amendment qualified privilege requires a balancing of the
24 plaintiffs' need for the information sought against proponents'
25 constitutional interests in claiming the privilege. See Adolph
26 Coors, 570 F Supp at 208. In this dispute, the interests the
27 parties claim are fundamental constitutional rights. Proponents
28 argue that their First Amendment associational rights are at stake

1 while plaintiffs contend that Prop 8 violates their Equal
2 Protection and Due Process rights and that denial of their
3 discovery request jeopardizes the vindication of those rights. The
4 claimed rights at issue thus appear to be of similar importance.

5 One tangible harm that proponents have claimed, and
6 events made known to the court substantiate, lies in threats and
7 harassment proponents claim have been suffered by known supporters
8 of Prop 8. Identifying new information about Prop 8 supporters
9 would, proponents argue, only exacerbate these problems. Doc #187.

10 The court is aware of the tendentious nature of the Prop
11 8 campaign and of the harassment that some Prop 8 supporters have
12 endured. See Doc #187-11. Proponents have not however adequately
13 explained why the discovery sought by plaintiffs increases the
14 threat of harm to Prop 8 supporters or explained why a protective
15 order strictly limiting the dissemination of such information would
16 not suffice to avoid future similar events. In sum, while there is
17 no doubt that proponents' political activities are protected by the
18 First Amendment, it is not at all clear that the discovery sought
19 here materially jeopardizes the First Amendment protections.
20 Furthermore, whether the First Amendment qualified privilege should
21 bar all or any part of plaintiffs' discovery request is open to
22 question under the circumstances of this case.

23 The key Supreme Court case upon which proponents rely,
24 NAACP v Alabama, supra, involved a civil contempt against the NAACP
25 for its failure to reveal the names and addresses of "all its
26 Alabama members and agents, without regard to their positions or
27 functions in the Association." 357 US at 451. As noted,
28 plaintiffs do not here seek the names and addresses of proponents'

1 rank-and-file members or volunteers. More importantly, the
2 protection against disclosure afforded by the holding in NAACP
3 appears fairly restricted.

4 Alabama sought "a large number of the Association's
5 records and papers, including bank statements, leases, deeds, and
6 records of all Alabama 'members' and 'agents' of the Association."
7 357 US at 453. The NAACP produced "substantially all the data
8 called for" except for its lists of rank-and-file members. Id at
9 454. Notably, the NAACP did not object "to divulging the identity
10 of its members who are employed by or hold official positions" in
11 the organization or to providing various other business records.
12 Id at 464-65. The Court contrasted the NAACP's extensive
13 disclosures with that in an earlier case in which another
14 organization made no disclosures at all. Id at 465-66. Alabama's
15 request for rank-and-file membership lists in NAACP was predicated
16 solely on its interest in enforcement of the state's foreign
17 corporation registration statute. Id at 464.

18 The Court observed that the disclosure of the names of
19 rank-and-file members seemed to lack a "substantial bearing" on
20 whether the NAACP, as a foreign corporation, should be authorized
21 to do business in Alabama. Id at 464. The interest of Alabama in
22 disclosure of rank-and-file membership lists thus was insubstantial
23 relative to the significant interests of the NAACP and its members
24 in carrying out their First Amendment and other activities that
25 included - in 1956 - "financial support and [] legal assistance to
26 Negro students seeking admission to the state university" and
27 support of "a Negro boycott of the bus lines in Montgomery to
28 compel the seating of passengers without regard to race." Id at

1 452.

2 Similarly, in a later case, the Supreme Court upheld a
3 qualified First Amendment privilege against disclosure of NAACP
4 membership lists where there was "no relevant correlation" between
5 the purpose for which the lists were sought, enforcement of
6 occupational license taxes, and the identity of NAACP rank-and-file
7 members. Bates v Little Rock, 361 US 516, 525 (1960). On like
8 grounds, the Supreme Court reversed a contempt conviction of the
9 president of the NAACP Miami branch who refused to produce NAACP
10 membership lists at a 1959 hearing of a state legislative committee
11 investigating "infiltration of Communists" into various
12 organizations. Gibson v Florida Legislative Committee, 372 US 539
13 (1963). No evidence in that case suggested that the NAACP was
14 "either Communist dominated or influenced," id at 548, undermining
15 the required nexus between the membership lists and the purpose for
16 which they were sought. Furthermore, at the hearing, the branch
17 president answered questions concerning membership in the NAACP and
18 responded to questions about a number of persons previously
19 identified as communists or members of communist front or other
20 affiliated organizations. Id at 543. Here, too, the qualified
21 First Amendment privilege protected only membership lists, and the
22 NAACP or its officials made significant disclosures apart from
23 membership lists.

24 These cases from the civil rights struggles of the 1950s
25 would thus appear to offer proponents scant support for refusing to
26 produce information other than rank-and-file membership lists which
27 plaintiffs, in any event, do not seek. Nor does proponents'
28 position gain much traction from McIntyre v Ohio Elections Comm'n,

1 514 US 334 (1995), which reversed petitioner's conviction, upheld
2 by the Ohio Supreme Court, for anonymously distributing leaflets
3 regarding a referendum on a proposed school tax levy in violation
4 of a statute prohibiting unsigned campaign materials. Petitioner
5 "acted independently," not as part of a campaign committee or
6 organization. Id at 337. Proponents, by contrast, are the
7 official proponents of Prop 8 with responsibility under state law
8 for compliance with electoral and campaign requirements. See Cal
9 Election Code § 342; Cal Gov't Code § 8204.7.

10 Proponents, moreover, have not demonstrated that the
11 procedure for invoking any First Amendment privilege applicable to
12 their communications with third parties differs from that of any
13 other privilege, such as the attorney-client privilege and trial
14 preparation or work product protection. A party seeking to
15 withhold discovery under a claim of privilege must "describe the
16 nature of the documents, communications, or tangible things not
17 produced or disclosed * * * in a manner that, without revealing
18 information itself privileged or protected, will enable other
19 parties to assess the claim." FRCP 26(b)(5)(A)(ii). Proponents
20 have failed to aver that they have prepared a privilege log that
21 would comply with the requirement of FRCP 26(b)(5)(A)(ii), a
22 necessary condition to preservation of any privilege. This failure
23 ordinarily could be fatal to any assertion of a privilege.

24 Burlington Nort & Santa Fe Ry v Dist Ct, Mt, 408 F3d 1142, 1149
25 (9th Cir 2005).

26 Proponents suggested at the September 25 hearing that the
27 enumeration requirement of FRCP 26 does not apply to a First
28 Amendment privilege, based as it is on fundamental constitutional

1 principles rather than common law, the origin of the attorney-
2 client privilege and work product protection. Proponents contend
3 that as the communications regarding Prop 8 involve political
4 speech or association, Doc #197 at 11-12, they are entitled to a
5 greater degree of confidentiality than common law privileges. In
6 fact, as noted, it appears that any First Amendment privilege is a
7 qualified privilege affording less expansive protection against
8 discovery than the absolute privileges, such as the attorney-client
9 and similar privileges. The First Amendment privilege proponents
10 seek to invoke requires a balancing of interests that simply are
11 not weighed in the area of attorney-client communications, and that
12 balancing tends to limit or confine the First Amendment privilege
13 to those materials that rather directly implicate rights of
14 association.

15 In striking the appropriate balance, the court notes that
16 in addition to the substantial financial and related disclosures
17 required by California law, a rather striking disclosure concerning
18 campaign strategy has already voluntarily been made by at least
19 one, if not the principal, campaign manager-consultant employed by
20 proponents. Plaintiffs have attached to their memorandum a
21 magazine article written by Frank Schubert and Jeff Flint, whose
22 public affairs firm managed the Yes on 8 campaign. Doc #191-2. In
23 the article, Schubert and Flint refer specifically to campaign
24 strategy and decisions, noting that they needed to convince voters
25 "that there would be consequences if gay marriage were to be
26 permanently legalized." Id at 3. Schubert and Flint make clear
27 that their goal in the campaign was to "rais[e] doubts." Id. They
28 explain the campaign's "three broad areas" of focus as "religious

freedom," "individual freedom of expression" and "how this new 'fundamental right' would be inculcated in young children through the public schools." *Id.* Schubert and Flint refer to the help of "a massive volunteer effort through religious denominations." *Id.* The article describes, in great detail, how Schubert and Flint conceptualized the Yes on 8 television advertising campaign, culminating with "the break of the election": footage of "bewildered six-year-olds at a lesbian wedding." *Id.* at 4-5.

These extensive disclosures about the strategy of proponents' campaign suggest that relatively little weight should be afforded to proponents' interest in maintaining the confidentiality of communications concerning campaign strategy. If harm is threatened from disclosure of proponents' campaign strategy, it seems likely to have been realized by the candid description of the Prop 8 campaign's strategy already disseminated by Schubert and Flint. In any event, the unfortunate incidents of harassment to which proponents point as having occurred appear mostly to have been directed to proponents' financial supporters whose public identification was required by California law.

III

Proponents argue that the discovery sought is not relevant and therefore not discoverable. Under FRCP 26(b)(1), discovery is limited to "any nonprivileged matter that is relevant to any party's claim or defense," but "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Accordingly, the court need not determine at this juncture whether

1 the information sought would be admissible at trial; instead, the
2 court must determine whether the information sought is "reasonably
3 calculated" to lead to discovery of admissible evidence.

4 Plaintiffs assert that the discovery sought is relevant
5 to "the rationality and strength of [proponents'] purported state
6 interests and whether voters could reasonably accept them as a
7 basis for supporting Prop 8," as well as other factual disputes.
8 Doc #191 at 8. Additionally, plaintiffs believe the discovery will
9 lead to "party admissions and impeachment evidence." Id.

10 Plaintiffs' strongest argument appears to be that some of
11 the information sought about proponents' communications with third
12 parties may be relevant to the governmental interest that
13 proponents claim Prop 8 advances. Id. Relevant information may
14 exist in communications between proponents and those who assumed a
15 large role in the campaign, including the campaign executive
16 committee and political consultants, as that information well may
17 have been conveyed to the ultimate decision-makers, the voters, and
18 thus discloses the intent Prop 8 serves.

19 Key in this regard is the extent to which the requested
20 discovery could be relevant "to ascertain the purpose" of Prop 8.
21 Doc #187 at 10. Legislative purpose may be relevant to determine
22 whether, as plaintiffs claim, Prop 8 violates the Equal Protection
23 Clause. Washington v Davis, 426 US 229, 239-41 (1976) (holding
24 that a law only violates the Equal Protection component of the
25 Fifth Amendment when the law reflects a "discriminatory purpose,"
26 regardless of the law's disparate impact); see also Personnel Adm'r
27 of Massachusetts v Feeney, 442 US 256, 274 (1979) ("purposeful
28 discrimination is the condition that offends the Constitution.")

(citation omitted). The analysis remains the same whether the challenged measure was enacted by a legislature or directly by voters. Washington v Seattle School Dist no 1, 458 US 457, 484-85 (1982).

Proponents point to Southern Alameda Span Sp Org v City of Union City, Cal, 424 F2d 291, 295 (9th Cir 1970) ("SASSO"), and Bates v Jones, 131 F3d 843, 846 (9th Cir 1997) (en banc), for the proposition that the subjective intent of a voter is not a proper subject for judicial inquiry. In SASSO, the court determined that "probing the private attitude of the voters" would amount of "an intolerable invasion of the privacy that must protect an exercise of the franchise." 424 F2d at 295. In Bates, the court looked only to publicly available information to determine whether voters had sufficient notice of the effect of a referendum. 131 F3d at 846. While these cases make clear that voters cannot be asked to explain their votes, they do not rule out the possibility that other evidence might well be useful to determine intent.

Plaintiffs' proposed discovery is not outside the scope of what some courts have considered in determining the intent behind a measure enacted by voters. The Eighth Circuit has held that courts may look to the intent of drafters of an initiative to determine whether it was passed with a discriminatory intent. South Dakota Farm Bureau, Inc v Hazeltine, 340 F3d 583, 594 (8th Cir 2003). At least one district court in this circuit has considered drafter intent along with voter intent. City of Los Angeles v County of Kern, 462 F Supp 2d 1105, 1114 (CD Cal 2006). The parties acknowledge that the line demarking relevance in this context is not clearly drawn. The difficulty of line-drawing stems

1 from the fact that, as the California Supreme Court put it well,
2 "motive or purpose of [a legislative enactment] is not relevant to
3 its construction absent reason to conclude that the body which
4 adopted the [enactment] was aware of that purpose and believed the
5 language of the proposal would accomplish it." Robert L v Superior
6 Court, 30 Cal 4th 894, 904 (2003).

7 In the case of an initiative measure, the enacting body
8 is the electorate as a whole. The legislative record for an
9 initiative cannot, therefore, be compiled with the precision that
10 the legislative history of an enactment by a legislative body can
11 be put together. This would seem to suggest, as the Eighth Circuit
12 implied in South Dakota Farm Bureau, that the scope of permissible
13 discovery might well be broader in the case of an initiative
14 measure or a referendum than a law coming out of a popularly
15 elected, and thus democratically chosen, legislative body. However
16 that may be, the mix of information before and available to the
17 voters forms a legislative history that may permit the court to
18 discern whether the legislative intent of an initiative measure is
19 consistent with and advances the governmental interest that its
20 proponents claim in litigation challenging the validity of that
21 measure or was a discriminatory motive.

22 Proponents have agreed to disclose communications they
23 targeted to voters, including communications to discrete groups of
24 voters. Doc #197 at 6. But at the September 25 hearing,
25 proponents stated that they did not believe "non-public"
26 communications to confirmed Prop 8 supporters or to those involved
27 in the Prop 8 campaign could be relevant to the intent
28 determination. Proponents point out that those communications were

1 not directly before the voters. But it does appear to the court
2 that communications between proponents and political consultants or
3 campaign managers, even about messages contemplated but not
4 actually disseminated, could fairly readily lead to admissible
5 evidence illuminating the messages disseminated to voters. At
6 least some of these contemplated, but not delivered, messages may
7 well have diffused to voters through sources other than the
8 official channels of proponents' campaign. Furthermore, of course,
9 what was decided not to be said in a political campaign may cast
10 light on what was actually said. The line between relevant and
11 non-relevant communications is not identical to the public/non-
12 public distinction drawn by proponents. At least some "non-public"
13 communications from proponents to those who assumed a large role in
14 the Prop 8 campaign could be relevant to the voters' understanding
15 of Prop 8 and to the ultimate determination of intent.

16 While it appears that plaintiffs' request no 8 seeks
17 relevant disclosures, the request itself is broader than necessary
18 to obtain all relevant discovery. Proponents point out that even
19 if some of the discovery sought by plaintiffs might be relevant,
20 "virtually every communication made by anyone included in or
21 associated with Protect Marriage" cannot be relevant. Doc #197 at
22 7. The court agrees. Further, of course, no amount of discovery
23 could corral all of the information on which voters cast their
24 ballots on Prop 8. Proponents' undue burden objection is thus
25 well-taken. It should suffice for purposes of this litigation to
26 gather enough information about the strategy and communications of
27 the Prop 8 campaign to afford a record upon which to discern the
28 intent underlying Prop 8's enactment. Plaintiffs' request no 8,

1 currently encompassing any communication between proponents and any
2 third party, is simply too broad.

3 Narrowing of plaintiffs' request is required. In their
4 discussions, the parties have focused on the appropriate
5 distinction – that between documents which relate to public
6 communications with third parties and purely private communications
7 among proponents. Hence, discovery directed to uncovering whether
8 proponents harbor private sentiments that may have prompted their
9 efforts is simply not relevant to the legislative intent behind
10 Prop 8. That does not mean that discovery should be limited
11 strictly to communications with the public at large. Documents
12 pertaining to the planning of the campaign for Prop 8 and the
13 messages actually distributed, or contemplated to be distributed,
14 to voters would likely to lead to discovery of admissible evidence,
15 as such documents share a clear nexus with the information put
16 before the voters. Communications distributed to voters, as well
17 as communications considered but not sent appear to be fair
18 subjects for discovery, as the revision or rejection of a
19 contemplated campaign message may well illuminate what information
20 was actually conveyed to voters. Communications that took place
21 after the election date may similarly be relevant if they are
22 connected in some way to the pre-election messages conveyed to the
23 voters. But discovery not sufficiently related to what the voters
24 could have considered is not relevant and will not be permitted.

25 Plaintiffs are therefore DIRECTED to revise request no 8
26 to target those communications most likely to be relevant to the
27 factual issues identified by plaintiffs.

28 \\\

While it is not the province of the court to redraft plaintiffs' request no 8 or to interpose objections for proponents, the foregoing highlights general areas of appropriate inquiry. It seems to the court that request no 8 is appropriate to the extent it calls for (1) communications by and among proponents and their agents (at a minimum, Schubert Flint Public Affairs) concerning campaign strategy and (2) communications by and among proponents and their agents concerning messages to be conveyed to voters, without regard to whether the voters or voter groups were viewed as likely supporters or opponents or undecided about Prop 8 and without regard to whether the messages were actually disseminated or merely contemplated. In addition, communications by and among proponents with those who assumed a directorial or managerial role in the Prop 8 campaign, like political consultants or ProtectMarriage.com's treasurer and executive committee, among others, would appear likely to lead to discovery of admissible evidence.

IV

Proponents motion for a protective order is GRANTED in part and DENIED in part. Doc #187. Proponents have not shown that the First Amendment privilege is applicable to the discovery sought by plaintiffs. Because plaintiffs' request no 8 is overly broad, plaintiffs shall revise the request and tailor it to relevant factual issues, individuals and entities. The court stands ready to assist the parties in pursuing specific additional discovery in line with the guidance provided herein and, if necessary, to assist the parties in fashioning a protective order where necessary to

1 ensure that disclosures through the discovery process do not result
2 in adverse effects on the parties or entities or individuals not
3 parties to this litigation.

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6 IT IS SO ORDERED.

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9 VAUGHN R WALKER
10 United States District Chief Judge
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